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No. 03-1543

AUG 13 2004
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IN THE

Supreme Court of the United States

RICHARD R. RICHARD, JR., on behalf of himself and all others similarly situated,
Petitioner,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E. I. DU PONT DE NEMOURS AND COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT E. I. DU PONT DE NEMOURS AND COMPANY

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in finding that petitioner's claim under 42 U.S.C. § 1983 is jurisdictionally barred by the *Rooker-Feldman* doctrine as an impermissible collateral attack on two state court final judgments and is substantively meritless because of the failure to allege state action.

2. Whether the Court of Appeals for the Fifth Circuit erred in holding that, even assuming *arguendo* that disgorgement is a remedy available in private civil RICO actions, petitioner was not entitled to a disgorgement remedy under the circumstances of this case because there was no allegation of future misconduct.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent E. I. du Pont de Nemours and Company states that it has no parent corporations and that there are no publicly held companies that own more than 10% of its stock.

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BRIEF IN OPPOSITION OF RESPONDENT E. I. DU PONT DE NEMOURS AND COMPANY

INTRODUCTION

This petition arises out of petitioner's effort to mount a federal court collateral attack on two state court judgments that approved national class action settlements of consumer products lawsuits involving polybutylene plumbing. Applying the due process standards applicable to class actions set forth by this Court, the respective state courts presiding over the two class action settlements determined that due process had been afforded absent class members (*i.e.*, that notice was proper, representation was adequate and thus that nationwide settlement classes could be certified).

Petitioner ultimately sought to cast his collateral attack on these judgments as a claim under 42 U.S.C. § 1983. However, in order to prevail on his § 1983 claim, he would have to overturn the state court judgments that disposed of his due process argument. Such an attack upon a state court judgment in a federal district court is jurisdictionally barred by the *Rooker-Feldman* doctrine. The federal courts have consistently held that the *Rooker-Feldman* doctrine bars federal court review of state class action settlements. Petitioner is unable to identify even a hint of conflict among the circuit courts on that point.

Petitioner's effort to state a § 1983 claim for denial of due process was likewise defective, for equally uncontroversial reasons. Petitioner was unable to show state action by respondents, private actors. Under this Court's clear precedents, a private party does not become a state actor liable for a constitutional violation under § 1983 by persuading a state court judge to issue an allegedly erroneous ruling on a constitutional issue. The Fifth Circuit properly recognized that petitioner's "blatant nonconformity with the requirements of § 1983 [] suggests that he has merely cast his complaint in the form of a civil rights action in an attempt to circumvent *Rooker-Feldman*." Pet. App. 11.

Petitioner's attempt to obtain federal court jurisdiction by transforming his consumer products lawsuit into a fraud claim under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, was equally unsuccessful. The Fifth Circuit was willing, *arguendo*, to indulge petitioner the triple assumptions that a private party can avail itself of equitable remedies under RICO, that "disgorgement" of profits is an equitable remedy potentially available in this context, and that a party pursuing equitable remedies does not have to show reliance on a misrepresentation. But fully consistent with the only other circuit court to consider this issue, the Fifth Circuit held that an equitable remedy is not

available under RICO where there is no ongoing or future misconduct to prevent because the consumer products at issue have not been manufactured or marketed for years.

COUNTERSTATEMENT

A. The *Cox* and *Spencer* Settlements.

1. Respondents Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"), and E. I. du Pont de Nemours and Company ("DuPont") produced raw materials sold to other manufacturers who used those materials to make plumbing components. Shell sold polybutylene resin to manufacturers who extruded it into pipes for use in plumbing systems. Celanese and DuPont sold acetal plastic resin to manufacturers who molded it into fittings used to connect pipes in plumbing systems. DuPont ceased marketing and selling its raw material for use in polybutylene plumbing in the late 1980s.

2. In November 1994, *Spencer v. Shell Oil Co.*, No. CV-94-047 (Ala. Cir. Ct., Greene County), a nationwide class action, was filed against respondents in Alabama state court alleging defects associated with polybutylene plumbing. In May 1995, DuPont agreed to a national class action settlement in *Spencer*. Under the terms of the *Spencer* settlement, DuPont agreed to pay class members 10% of replumbs and physical damage to tangible property caused by leaks. DuPont agreed to provide $120 million to fund these costs. The $120 million figure is a "soft cap," meaning that if costs exceed this figure, DuPont may provide additional funding. If DuPont declines to provide additional funding, any unpaid class members will retain their rights to pursue claims against DuPont. R. 838.[1]

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[1] Citations to "R." refer to the record on appeal in the Fifth Circuit.

3. In June 1995, *Cox v. Shell Oil Co.*, No. 18,844 (Tenn. Ch. Ct., Obion County) ("*Cox*"), a nationwide class action, was filed in Tennessee state court against Shell and Celanese. (DuPont was not a party.) The *Cox* court preliminarily approved a nationwide class settlement with Shell and Celanese in August 1995. Under the settlement agreement, Shell and Celanese agreed to fund replumbs and physical damage to tangible property of the class members caused by a qualifying leak and to provide $850 million in a "soft cap" fund.

Class counsel in each of the *Cox* and *Spencer* actions filed objections to the other settlement. Other parties also filed objections. In October and November 1995, *Cox* and *Spencer* class counsel and respondents participated in a mediation conducted by California Superior Court Judge Robert Silver.[2] The mediation resulted in some changes to the *Cox* settlement, including an increase in the initial funding to $950 million. Judge Silver noted that "[b]efore I would agree to recommend the settlement, it would have to meet a class fairness standard . . . ." *Meers v. Shell Oil Co.*, No. M-30590 (Cal. Super. Ct., Monterey County Nov. 8, 1995) (recommendation re: Spencer/Cox settlement).

4. The *Spencer* court conducted a fairness hearing and approved the settlement on November 17, 1995. The court specifically addressed the appropriate due process considerations, finding the settlement "fair, adequate. and reasonable to the Plaintiffs." App. 16a-17a. The court ruled that the $7.4 million notice program had "accurately described the pending Action" and that "the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the

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[2] Judge Silver was then presiding over yet another putative statewide class action in California, *Meers v. Shell Oil Co.*, No. M-30590 (Cal. Super. Ct., Monterey County). The *Cox* and *Spencer* courts were aware of Judge Silver's mediation efforts.

pendency of the Action and their rights therein."[3] *Id.* at 17a. The court considered and overruled objections to the adequacy of representation, finding that the class representatives would "fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class." *Id.* at 10a.

The *Spencer* court's order approving the class settlement released DuPont from any claims by a member of the settlement class, "whether known, unknown, foreseen, unforeseen, patent or latent, . . . arising from, resulting from, or in any manner relating to polybutylene plumbing systems." *Id.* at 19a-20a. The release further enjoined members of the settlement class from "commencing or participating in any action, either directly, individually, representatively, or in any capacity, against [DuPont] arising from, resulting from or in any manner relating to polybutylene plumbing systems or the subject of the above-captioned Action."[4]

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[3] The record before the Alabama court included an estimate from an independent notice expert that the paid advertising program reached 96.6 percent of adults nationwide and that they were exposed to the message an average of 4.9 times. Notice included (1) direct mailing of over 2.5 million notices to individuals; (2) a massive national campaign consisting of national network and cable television advertisements, radio advertisements, an extensive print campaign that targeted national, regional, and local publications, and the mailing of information kits to numerous membership organizations with interests related to polybutylene plumbing; and (3) a non-paid or "earned media" campaign, such as press releases and video news releases. Two supplemental notice programs were conducted in 1999 and 2004.

[4] The Alabama court "reserve[d] jurisdiction, without affecting the finality of this Order, over: (a) implementation of this Settlement Agreement; (b) enforcing and administering this Order as against any of the Settling Parties or Settlement Class Members; (c) enforcing and administering the Settlement Agreement, including any releases in connection therewith; and (d) other matters related or ancillary to the foregoing." App. 20a.

5. The Tennessee court similarly conducted a fairness hearing on the *Cox* settlement, giving that class settlement final approval on November 17, 1995. The *Cox* court carefully addressed the due process issues. The court characterized the notice program as "singularly comprehensive and creative," found that it provided the best notice practicable under the circumstances, and specifically ruled that it "met and exceeded" minimum due process requirements. App. 36a, 40a. With respect to adequacy of representation, the court held that "*Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." *Id.* at 45a.

B. The Proceedings Below.

In 1997, petitioner purchased a used mobile home containing polybutylene plumbing. On January 19, 2000, he filed the instant federal court action in the United States District Court for the Eastern District of Texas. The original complaint alleged conspiracy, strict liability, negligence, and breach of implied warranties arising from polybutylene plumbing—claims resolved and released in *Cox* and *Spencer*.[5]

After respondents moved to dismiss for lack of subject matter jurisdiction because petitioner's claims were based solely on state law, petitioner alleged violations of RICO and the Due Process Clause of the United States Constitution.[6]

On June 27, 2000, the Fifth Circuit decided *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th

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[5] Petitioner could have, but did not, file a claim under the *Cox* and *Spencer* settlements seeking recovery for his alleged plumbing damages.

[6] Petitioner also added a Lanham Act claim, which he voluntarily dismissed when respondents pointed out that consumers have no standing to sue under the Lanham Act.

Cir. 2000), a case brought against respondents by some of the same counsel representing petitioner, and which alleged RICO violations involving polybutylene plumbing. Applying *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which held that a RICO plaintiff must show that defendant proximately caused its injury, the *Summit* court dismissed the case because plaintiffs had not alleged reliance on any misrepresentations by respondents. *Summit*, 214 F.3d at 560.

Respondents moved to dismiss petitioner's RICO claims in this case because they were identical to those dismissed in *Summit*. Respondents also moved to dismiss petitioner's due process claim as barred by the *Rooker-Feldman* doctrine. On October 2, 2000, attempting to avoid the holding of *Summit*, petitioner amended his RICO claims to include an allegation of reliance on alleged misrepresentations by respondents.

Petitioner filed a RICO statement of facts on March 15, 2001. That statement demonstrated that—contrary to his earlier allegations—petitioner had *not* relied on any misrepresentations by respondents; indeed, he was *unaware* of any representations by respondents. Respondents immediately renewed their motions to dismiss based on *Summit*.

Petitioner's effort to contrive a RICO claim evolved further during an October 17, 2001 hearing, during which he argued that he could avoid the obligation to allege reliance and proximate cause, as required by *Holmes* and *Summit*, by instead pursuing equitable remedies. The particular "equitable remedy" he sought was monetary: "disgorgement" of respondents' "past profits."

With respect to the due process allegations, although no version of his complaint specified a § 1983 claim, petitioner's June 14, 2001 brief asserted a violation of 42 U.S.C. § 1983 based on his allegations that "Defendants conspired to

corruptly use state courts to enforce a legal process that violated Plaintiffs due process rights." R. 930.

C. The Decisions Below.

On March 24, 2002, the district court dismissed petitioner's § 1983 claim for lack of subject matter jurisdiction. The court noted that, under the *Rooker-Feldman* doctrine, "Plaintiff cannot seek to have this Court review the final judgments of the *Cox* and *Spencer* Courts." Pet. App. 35. Although "framed as a § 1983 claim," the petitioner's claim was, in effect, a collateral attack on the state court judgments foreclosed by *Rooker-Feldman*. *Id.*

With respect to petitioner's RICO claims, the district court held that it had subject matter jurisdiction, but found that petitioner's claims failed under *Holmes* and *Summit* because petitioner had not alleged reliance on any misrepresentation. *Id.* at 45. The district court also held that petitioner was not exempted from showing reliance by claiming that disgorgement was an appropriate remedy.

The United States Court of Appeals for the Fifth Circuit affirmed. The court held that petitioner's due process claims under § 1983 "indisputably denounce the express findings" of the *Cox* court on the due process issues and "would result in setting aside a state court judgment," *id.* at 10, and therefore were barred by the *Rooker-Feldman* doctrine.

The Fifth Circuit also rejected petitioner's effort to plead a claim under § 1983, finding that petitioner had "attempted to circumvent the *Rooker-Feldman* doctrine by intertwining a groundless § 1983 claim with the state court findings." *Id.* at 15. Because petitioner's claims against the private defendants did not involve state action, they could not form the predicate for a constitutional claim under 42 U.S.C. § 1983.

With respect to petitioner's claim seeking disgorgement under RICO, the Court of Appeals assumed, *arguendo*, that a private party could obtain equitable relief under RICO without showing reliance on a misrepresentation. The court nevertheless found that disgorgement was not available as a remedy to petitioner under the facts of this case because 18 U.S.C. § 1964(a) "establishes that equitable remedies [under RICO] are available only to prevent ongoing and future conduct." *Id.* at 17. Because respondents had ceased marketing the products at issue years earlier, petitioner "fail[ed] to argue that disgorgement would 'prevent and restrain' similar RICO violations in the future." *Id.*

REASONS FOR DENYING THE PETITION

The petition presents no question warranting this Court's review. Applying this Court's prescribed standards for judging due process in the context of a class action (as set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)), the *Cox* and *Spencer* courts that approved the class settlements specifically considered and rejected the due process arguments that petitioner now raises. The judgments of those courts are entitled to full faith and credit. Because petitioner's § 1983 claim directly attacks those judgments, it is barred by the *Rooker-Feldman* doctrine. Moreover, petitioner's § 1983 claim against respondents cannot succeed because petitioner cannot show "state action." Private parties do not become "state actors" because they persuaded a state court to make what petitioner asserts is an erroneous due process determination. There are no circuit decisions in conflict with the decision of the Fifth Circuit on either of these points.

Petitioner's effort to present an issue to this Court regarding the precise scope of one form of equitable relief potentially available under RICO is equally unavailing. Assuming *arguendo* that disgorgement is available under

RICO to private plaintiffs, the plain language of the RICO statute demonstrates that disgorgement is unavailable as an equitable remedy under RICO where it would not prevent future misconduct. The only other circuit court to address a similar issue reached an identical conclusion. Even on the narrow, fact-bound issue that petitioner proffers, there is no conflict in the circuits.

I. THE FIFTH CIRCUIT PROPERLY FOUND THAT PETITIONER'S § 1983 CLAIM CANNOT BE SUSTAINED.

Petitioner bases his § 1983 claim on the theory that the private defendants in the class actions—respondents here—deprived him of due process by leading the state courts into erroneous decisions on the due process issue. Pet. 7, 18. The Fifth Circuit rejected this claim. First, it found that petitioner's request to have a federal court review the Tennessee and Alabama state courts' determinations that due process had been afforded absent class members was barred by the *Rooker-Feldman* doctrine. Second, the Fifth Circuit found that petitioner could not present a colorable claim under § 1983 because private defendants are not rendered state actors merely by seeking and obtaining judgments from state courts.

Both conclusions are clearly correct and are not in conflict with the law of any other circuit.

A. The *Rooker-Feldman* Doctrine Bars Petitioner's § 1983 Claim Because The Underlying Class Action Settlements Afforded Class Members Due Process.

1. The *Rooker-Feldman* doctrine recognizes a fundamental principle: The grant of federal question jurisdiction to the federal district courts does *not* give those courts the authority and jurisdiction to sit in review of the final judgments of state

courts, even on federal questions.[7] *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415 (1923). To the contrary, state courts are bound by federal law; state appellate courts are fully capable of evaluating violations of federal and constitutional law. Therefore, only the United State Supreme Court may undertake federal review of final state court judgments, even those involving federal and constitutional law. *See D.C. Ct. App. v. Feldman*, 460 U.S. 462, 482 (1983) (holding that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings"). Even if a state court is alleged to have decided a matter of federal constitutional law incorrectly, the *Rooker-Feldman* doctrine forecloses review in the lower federal courts.[8]

The Fifth Circuit here, following the lead of the Seventh Circuit in *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510-11 (7th Cir. 1996), and the Eighth Circuit in *Snider v. City of Excelsior Springs, Mo.*, 154 F.3d 809, 812 (8th Cir. 1998), held that *Rooker-Feldman* bars precisely this type of collateral attack on a class action judgment. Pet. App. 8. *See also In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998) (refusing to examine the due process afforded to class members in a Louisiana class action because "*Rooker-Feldman* bars exactly this sort of intermediate appellate review of state

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[7] The *Rooker-Feldman* doctrine is a jurisdictional bar—unlike *res judicata* or full faith and credit, which are traditionally raised as affirmative defenses. Where a claim is subject to dismissal both as a matter of *res judicata* and *Rooker-Feldman*, *Rooker-Feldman* typically provides the grounds for dismissal because as a jurisdictional doctrine, it is addressed first.

[8] *See ITT Corp. v. Intelnet Int'l Corp.*, 366 F.3d 205, 212 (3d Cir. 2004) (whether the state court's decision was correct as a matter of federal law is irrelevant under *Rooker-Feldman*); *GASH Assocs. v. Vill. of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993) (*Rooker-Feldman* applies even when state court's judgment is erroneous and based on unconstitutional procedures) (citing *Ritter v. Ross*, 992 F.2d 750, 755 (7th Cir. 1993)).

court judgments"). There is no circuit that has held or suggested to the contrary.

Here, the *Cox* and *Spencer* courts, applying *Shutts*, each examined whether absent class members had been afforded due process in the form of adequate notice and adequate representation by both the class representatives and class counsel. For example, the *Spencer* court ruled that "the means of disseminating the [class] notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the Action and their rights therein." App. 17a. It also considered objections to the adequacy of representation, finding that the class representatives would "fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class." *Id.* at 10a.

The *Cox* court likewise addressed the due process issues. The *Cox* court described notice to class members as "singularly comprehensive," found that it provided the best notice practicable under the circumstances, and held that it "met and exceeded" minimum due process requirements. *Id.* at 36a, 40a. With respect to adequacy of representation, the court held that "*Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." *Id.* at 45a.

In light of these determinations, the Fifth Circuit had little difficulty concluding that petitioner's claim that the *Cox* court violated absent class members' due process rights was barred by *Rooker-Feldman*. Petitioner's allegations that absent class members were deprived of due process "indisputably denounce the express findings of the *Cox* state court. Because his challenge would result in setting aside a state court judgment, *Rooker-Feldman* seems to bar federal review of these findings." Pet. App. 10.

2. Petitioner asserts that the Fifth Circuit erred by using the *Rooker-Feldman* doctrine to give the judgments of the *Cox* and *Spencer* courts *greater* preclusive effect than they would be given in the states where they were rendered.[9] Pet. 4-5. Petitioner asserts that he would be free to raise a due process challenge to those judgments in any state court; *i.e.*, that full faith and credit would not bar a due process challenge to those judgments. On that basis, he contends that the Fifth Circuit improperly applied the *Rooker-Feldman* doctrine to preempt his right to have a federal court examine whether the state court had, in fact, afforded absent class members due process. *Id.*

Petitioner is wrong both in his description of the Fifth Circuit's holding and on the law.

The Fifth Circuit did not give the judgment of the *Cox* court a broader effect under the *Rooker-Feldman* doctrine than it would have as a matter of full faith and credit, as petitioner claims. To the contrary, the Court of Appeals recognized at the outset that "the *Rooker-Feldman* doctrine only applies insofar as a state court judgment merits full faith and credit."[10] Pet. App. 8-9. This, in turn, required the court issuing the judgment to have considered the relevant due process issues. *See id.* at 9 (noting that the court must ensure that "class members have received adequate notice, representation, and an opportunity to opt-out" and that the settlement judgment has no preclusive effect if the court does not comply with these procedures). Thus, the Fifth Circuit

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[9] A court entertaining a collateral attack on a state court judgment must determine, before granting preclusive effect to that judgment, whether the law of the state in which the judgment was rendered would grant preclusive effect to the judgment. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373,-381 (1985).

[10] The full faith and credit principle is set forth in Article IV, Section 1 of the United States Constitution and codified in the Full Faith and Credit Act, 28 U.S.C. § 1738.

did *not* give the state court judgment broader binding effect under *Rooker-Feldman* than it would have as a matter of full faith and credit.

Moreover, petitioner makes a fundamental mistake in assuming that the *Cox* court's due process determinations would be subject to collateral attack in state court on due process grounds. Pet. 10. To the contrary, the law is clear that if the court presiding over a class settlement conducted the due process inquiry mandated by this Court's cases, including *Shutts*—as both the *Cox* and *Spencer* courts did here—the state court's determination that the class could properly bind absent class members is entitled to full faith and credit. Its determination is not subject to second-guessing by any subsequent court.[11] Significantly, each of the several state courts that has considered whether the *Cox* class action settlement and ensuing judgment is entitled to full faith and credit, notwithstanding efforts to mount collateral due process attacks on that judgment, has rejected such challenges.

It is the responsibility of the *settlement court* to determine whether absent class members were afforded due process. *See generally Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996). As this Court made clear in *Matsushita*, a "judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the Act." *Id.* at 374. In that case, this Court found that the state court judgment approving the settlement should be afforded full faith and credit. The Court did so by referencing the findings of the Delaware courts on the due process issues,

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[11] If petitioner were correct, then no class settlement would ever be effective: parties seeking to bring claims already resolved by a prior class settlement could simply claim that the presiding court had erred in judging the adequacy of notice or class representation.

rather than by independently determining whether due process requirements had been met. *Id.* at 378-79.[12]

As long as the state court in which the class action was pending had procedures in place to protect absent class members' due process rights, *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940), its judgment and express determination that the class was properly certified and notified is entitled to full faith and credit. *See Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994) (rejecting absent class members' collateral attack on the adequacy of representation because opportunity to appeal within state court system and United States Supreme Court "granted all the process that was due"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) (objections to determinations of certifying court had to be remedied on appeal to state supreme court or United States Supreme Court, rather than by recourse to the "federal courts in the vain pursuit of back-door relief"); *Fine v. Am. Online, Inc.*, 743 N.E.2d 416, 420 (Ohio Ct. App. 2000) ("[m]odern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but, rather, by the application of

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[12] It is only in those circumstances, typified by *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), where some specific subclass, such as a class of *future* claimants, cannot receive notice, participate in the case, or be fairly represented by those who do appear in the litigation, that significant due process questions may arise.

This is not such a case, despite petitioner's assertion that the *Cox* and *Spencer* class representatives could not adequately represent him because he was a "future class member." Pet. 6. While petitioner apparently believes that "future class member" is the magic phrase that triggers the due process concerns discussed in *Amchem*, this case does *not* present the situation presented in *Amchem*. Petitioner is not a member of a discrete subclass of persons whose claims had not yet arisen, who could not receive notice, and whose interests could not be adequately represented by those parties that did participate in the case.

appropriate procedures in the certifying court"). Here, the *Cox* and *Spencer* courts had such procedures in place to protect the due process rights of absent class members.[13]

Therefore, contrary to petitioner's assertions and assumptions (Pet. 12), a settlement court's explicit determination that due process has been afforded to all class members cannot be collaterally challenged. *See Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999); *Grimes*, 17 F.3d at 1558; *Nottingham*, 925 F.2d at 33. Where that court conducts the proper due process inquiry, absent class members' due process rights to notice and adequate representation are protected *not* by collateral review of the state court's judgment in a federal district court or the courts of another state, but rather by appeal within the state court system, with ultimate federal review in the United States Supreme Court.[14]

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[13] In asserting that the settlement courts' treatment of absent class members raises serious due process issues in this case, petitioner cites *Shutts*, *Amchem*, and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Pet. 13, 19. But those cases did *not* involve a collateral attack on, but rather a direct appeal of, a class action judgment. Indeed, *Shutts* emphasizes that it is the *certifying court* that is charged with protecting the rights of absent class members. *See Shutts*, 472 U.S. at 809.

[14] Petitioner's claim that he did not personally receive notice of the *Cox* and *Spencer* settlements does not change the analysis. This Court long ago explained in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), that actual notice is not required in every instance. To the contrary, what due process requires is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. *Mullane* and its progeny established that due process requires no more than notice that is reasonable and appropriate given "the practicalities and peculiarities of the case." *Id.*

Moreover, the nature of notice in a class action setting assumes that actual notice might not be received by *some* potential parties in interest. The premise of the class action is that those parties who are not reached by notice, and who do not appear in the action, share common interests with those who *do* appear, either as class representatives or otherwise.

Petitioner also asserts that he is free to collaterally attack the *Cox* and *Spencer* settlements because he was not a party to those cases. Pet. 6, 15. This argument ignores the fundamental purpose of the class action mechanism. As this Court recognized in *Shutts*, the *essence* of the modern class action is the ability to bind absent class members, provided that due process requirements are satisfied. *See Shutts*, 472 U.S. at 811-12 (state court may exercise jurisdiction over non-resident members of plaintiff class as long as the court provides minimal procedural due process protection in the form of notice, an opportunity to be heard and participate, and a right to opt out from the class); *see also Hansberry*, 311 U.S. at 40-41 (class action is exception to the rule that one cannot be bound by judgment *in personam* in a litigation unless one was made a party in the traditional sense).

Therefore, as petitioner himself concedes, the issue whether he should be deemed a "party" to the *Cox* settlement depends on "whether the state court obtained jurisdiction over absent class members by applying procedural rules mandated by Tennessee law *and* the Constitution." Pet. 17. However, petitioner fails to acknowledge that the *Cox* and *Spencer* courts already made this determination. Therefore, this is not a matter for the federal courts to decide in the first instance, let alone to decide by way of review of the state court determination. Indeed, allowing a federal district court to review a state court's determination that due process had been afforded absent class members is precisely the type of federal court review of state court judgments barred by the *Rooker-Feldman* doctrine.

See Shutts, 472 U.S. at 809. Therefore, even if notice does not reach particular individuals, many others, with virtually identical interests and incentives (as determined by the court), will have received actual notice and can represent the interests of those parties who did not receive notice.

Although petitioner cites a number of decisions in which *Rooker-Feldman* was held *not* to apply on the particular facts of the case (Pet. 13-17), *none* of those cases involve the question presented here: Whether in the guise of a § 1983 claim alleging due process violations, a lower federal court may review a state court's judgment that determined that class certification was proper because all due process considerations were met.

B. Petitioner's § 1983 Claim Fails Because There Is No State Action.

The Fifth Circuit also examined petitioner's § 1983 "claim" on the merits, paying close attention to whether petitioner could show the requisite "state action." After conducting that examination, the Fifth Circuit recognized petitioner's § 1983 claim as a contrivance. Specifically, the Fifth Circuit concluded Richard's "blatant nonconformity with the requirements of § 1983 . . . suggests that he has merely cast his complaint in the form of a civil rights action in an attempt to circumvent *Rooker-Feldman*." Pet. App. 11. *See also id.* at 15. ("Richard has attempted to circumvent the *Rooker-Feldman* doctrine by intertwining a groundless § 1983 claim with the state court findings.") Indeed, in his multiple complaints in the district court, petitioner did not cite § 1983, much less attempt to plead facts sufficient to describe a cause of action under § 1983.

To allege a cause of action under 42 U.S.C. § 1983, a plaintiff must show that the defendant is a "state actor;" *i.e.*, that the defendant acted "under color of state law." Pet. App. 11 (citing this Court's cases). In this case, the Fifth Circuit applied the uncontroversial principle that a private party does not become a "state actor" merely by causing a court to take an unlawful or unconstitutional action. *Id.* at 14. Rather, applying the precedents of this Court—including *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Dennis v.*

Sparks, 449 U.S. 24, 28 (1980) —the Fifth Circuit held that only if a court official (*i.e.*, state employee) consciously and jointly participates with a private party in a single scheme can it be said that the private party's actions are "state action." Merely "resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." Pet. App. 14, quoting *Sparks*, 449 U.S. at 28.

In the face of these precedents and elementary principles, petitioner offers an "innocent agent" theory, pursuant to which he argues that liability should be imposed if a private party causes a state employee to deprive someone of his or her civil rights. Pet. 18. In support of his "innocent agent" theory, petitioner points to 18 U.S.C. § 2(b), which *statutorily* imposes criminal liability for causing a crime to be committed. Petitioner then cites three criminal law decisions that he says recognize the "innocent agent" principle in implementing that statutory directive. *See United States v. Rashwan*, 328 F.3d 160 (4th Cir. 2003) (criminal case arising out of fraudulent immigration documents); *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966) (criminal civil rights prosecution); *United States v. Smith*, 584 F.2d 731 (5th Cir. 1978) (violation of firearms record-keeping regulations). Suffice it to say that the criminal law statute on which petitioner relies has no application to civil liability under § 1983.

Petitioner has not identified any conflict among the Circuits.[15] Instead, he is complaining about a consistent refusal by the federal courts and this Court to export a specific, statutory criminal law principle to civil cases.

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[15] *Smith* (which petitioner relies upon as applying the innocent agent theory, albeit in the context of a criminal case) is itself a Fifth Circuit decision, thus demonstrating that Fifth Circuit law is fully consistent with the law of other Circuits on this point.

Petitioner asserts that this case involves duplicity. Petitioner says that "corrupt class counsel" deceived and manipulated the state court judges in the *Cox* and *Spencer* cases, thus transforming class counsel—private parties—into state actors. Pet. 18. To accept the theory that a *private party*'s improper actions become state action if the private party uses wrongful means in persuading a state court judge to agree with its position would render meaningless the standards of *joint* participation (by state officials and private parties) that this Court established in cases such as *Lugar* and *Sparks*. Under those precedents, there is simply no constitutional remedy under § 1983 for the actions of private parties.

Petitioner's second theory of state action (raised for the first time in his petition) is that "[a]pproval of a settlement by a state court constitutes 'state action.'" Pet. 18-19. This assertion, while true enough, does not advance petitioner's argument. Clearly, state court judges are state actors; yet petitioner did not bring his claims against any state judicial officials. The question here is whether the *respondents*, who are not state employees, are properly deemed state actors. Absent some joint action with the state court officials, they remain private parties.

Finally, petitioner asserts (for the first time in his petition) that the record in the *Cox* settlement "raises the substantial possibility of judicial malfeasance (bribery)." Petitioner makes his bald assertion of judicial corruption without any factual reference or support.[16] *See id.* at 7. It is conceivable

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[16] Petitioner's new claims of bribery were not raised in his pleadings below and expressly conflict with his previous descriptions of the role played by the *Cox* court. For example, in his second amended complaint, petitioner alleged that Shell's counsel "concealed from the *Cox* court" the fact that it took conflicting positions before another court. R. 508. In his reply brief before the Fifth Circuit, petitioner alleged "improprieties, irregularities, and misconduct through the actions of an innocent agent; in this case, the state judge." Likewise, petitioner states that "[t]he innocent

that a class member could state a valid § 1983 claim by alleging that class counsel bribed a state court judge to approve a collusive class settlement—making class counsel and the judge parties to a single corrupt scheme—and that such a claim of collusion and corruption would not be barred by the *Rooker-Feldman* doctrine. But petitioner has not alleged *any* facts in this case, in either the district court or the Fifth Circuit, to support the assertion of bribery and corruption that he casually tenders in his petition.

II. THE FIFTH CIRCUIT'S DISMISSAL OF PETITIONER'S RICO CLAIM RAISES NO QUESTIONS THAT WARRANT REVIEW BY THIS COURT.

The RICO issue that petitioner seeks to posture for this Court's review concerns the precise circumstances under which disgorgement of profits might be available to a private party as an equitable remedy under RICO. The availability of particular forms of equitable relief turns in most instances on the factual setting in which relief is sought, as it does here. Indeed, the novelty and narrowness of the question that petitioner seeks to present to this Court is highlighted by the number of suppositions and assumptions that the Fifth Circuit had to indulge even to reach the disgorgement question that petitioner tenders.[17] For example, the Fifth Circuit assumed

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agent here, on one theory of the litigation, was the state court judge. Corrupt class counsel willfully deceived and manipulated the judge into approving a collusive settlement . . . ." Pet. 18. Petitioner's new bribery allegation appears to be nothing more than his latest attempt to recast his § 1983 claim in order to maneuver around the binding effect of the *Cox* and *Spencer* settlements.

[17] In addition to assuming that equitable remedies are available to civil RICO plaintiffs, it is necessary to make the following highly questionable

(without evaluating whether it were true) that equitable remedies are available to a private litigant under RICO. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) (reserving on that question).[18] It further had to assume that the remedy would be available to a party that could not allege that it had been proximately injured by any conduct of defendants. But even giving petitioner the benefit of the doubt on these questions (as the court below did), the Fifth Circuit decided the disgorgement issue in accordance with the plain language of the statute, and in a manner consistent with the decision of the only other Court of Appeals that has addressed a similar issue (as well as a recent district court decision).[19]

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legal assumptions in order to even consider petitioner's disgorgement argument:

> (1) a private party alleging fraud in connection with a RICO claim need not meet the proximate cause requirements imposed by *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), if he seeks an equitable remedy;
>
> (2) the rule in (1) above would apply even if the plaintiff were seeking a *monetary* equitable remedy, such as disgorgement;
>
> (3) a private party (as opposed to public party) is entitled to seek a windfall monetary remedy of disgorgement of profits; and
>
> (4) as a matter of election of remedies, a plaintiff can obtain disgorgement after already receiving damages for the same transactions via a class settlement (and a defendant can be forced to disgorge profits after already having paid damages).

[18] Although petitioner asserts that this case provides the Court with an opportunity to address whether equitable remedies are available to private litigants under RICO (Pet. 20, 23), both the district and appellate courts below declined to rule on the issue. Instead, they assumed (in petitioner's favor) that such remedies might be available, but found they were not available to petitioner under the circumstances of this case.

[19] Petitioner's RICO claims are also foreclosed for two additional reasons. First, petitioner's RICO causes of action are based on the allegation that respondents formed a "Polybutylene Group" that conspired "to

Petitioner maintains that he may use the equitable remedy of disgorgement to recover the respondents' past profits obtained from the alleged RICO violations, notwithstanding that the class action settlements already provided for damages

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fraudulently advertise and sell polybutylene systems that they knew to be unsuitable for potable water." R. 502. These allegations are identical to the factual allegations upon which the *Cox* and *Spencer* class actions were premised. Thus, these claims were released as part of the *Cox* and *Spencer* settlements. App. 19a, 24a.

Second, petitioner's RICO claims are precluded by the doctrine of *res judicata*. "[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); *see also Nevada v. United States*, 463 U.S. 110, 129-30 (1983) ("[T]he doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose'") (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

The elements of *res judicata* are clearly met in this instance. Final judgments were entered in the state court proceedings. *See* App. B, C. Petitioner is a member of the classes defined in *Cox* and *Spencer* and, therefore, bound by those judgments. *See* Restatement (Second) of Judgments § 41, cmt. e (1980) ("[when] . . . a class action is authorized under rules such as Rule 23 of the Federal Rules of Civil Procedure, persons within the class are bound by a judgment for or against the representative"). Petitioner's RICO claims arise from the same transactions and occurrences alleged in *Cox* and *Spencer*. *See Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634 (2d Cir. 1989) (RICO claims barred by *res judicata* where based on same transactions and occurrences alleged in prior civil rights suits); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986) (RICO claims barred by *res judicata* where based on same transactions and occurrences alleged in prior antitrust action). The *Cox* and *Spencer* plaintiffs could have brought RICO claims in the state court, *see Tafflin v. Levitt*, 493 U.S. 455 (1990) (state courts possess jurisdiction to consider civil RICO claims), but chose not to do so. Other class members have no right to bring them now.

arising out of the same alleged transactions. Even assuming that petitioner is correct, the court below nonetheless correctly rejected petitioner's argument based on the scope of equitable remedies available under RICO. The Fifth Circuit noted that 18 U.S.C. § 1964(a) extends RICO jurisdiction only "to prevent and restrain" violations of RICO and held that "Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct." Pet. App. 17. Thus, even if equitable relief is *sometimes* available as a private remedy, and disgorgement is among the forms of equitable relief that might be available in some circumstances to a private party, it is not available here. The court below observed that "Richard concedes that the Appellees no longer market the plumbing systems." *Id.* Indeed, DuPont ceased selling Delrin® to other manufacturers for use in polybutylene plumbing in 1989. Thus, in this case, disgorgement cannot serve the purpose of preventing future misconduct.

Contrary to petitioner's assertion that there is a conflict in the circuits on this issue (Pet. 20), the Fifth Circuit's reasoning is fully consistent with that of the Second Circuit in *United States v. Carson*, 52 F.3d 1173, 1181 (2d Cir. 1995), the only other federal appellate decision to have addressed the scope of a possible disgorgement remedy under § 1964(a).[20] The court below noted that "when disgorgement is sought for the purpose of compensating a party for past injuries, the [Second Circuit] held that the plain language of § 1964 bars relief." Pet. App. 17. The Fifth Circuit specifically stated

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[20] The United States District Court for the District of Columbia recently criticized *Carson* in *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72, 77 (D.D.C. 2004) (citing *Carson*, 52 F.3d at 1182). Nevertheless, the *Philip Morris* court ultimately ruled that the proper inquiry in determining whether disgorgement is available is whether the plaintiff presented "a showing of a reasonable likelihood of future RICO violations." *Id.* at 76. Even under this formulation, there is no reasonable likelihood of continuing RICO violations with respect to a product that has not been manufactured for nearly a decade.

that "[w]e agree with the Second Circuit's reasoning in *Carson*." *Id.*

Referring to *Carson*, petitioner asserts that the court below "twisted the decision it purported to follow" because the defendant in *Carson* was a retired union official and respondents here "are big corporations, perpetual in duration and constantly obtaining new revenue." Pet. 20-22. However, the size and income of respondents is irrelevant to the question of whether disgorgement will halt a continuing series of RICO violations. As in *Carson*, the significant fact here is that the acts petitioner complains of occurred many years ago and petitioner has not alleged any facts showing continuation of the alleged conduct. Indeed, all of the alleged RICO predicate acts described in petitioner's most recent amended complaint occurred between 1978 and 1987. R. 499-501. Equitable relief would not put a halt to continuing misconduct in this case, because there is none. The Fifth Circuit's decision is fully consistent with the language of § 1964(c) and with the only other circuit court to have considered a similar issue.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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